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Nos. 80-1190 and 80-1193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PULLMAN-STANDARD, a Division of Pullman, Incorporated, UNITED STEELWORKERS OF AMERICA, AFL-CIO, and LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Petitioners,

v.

LOUIS SWINT AND WILLIE JOHNSON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

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BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

The Equal Employment Advisory Council (EEAC), with the written consent of all parties,[1] respectfully submits this brief as Amicus Curiae in support of the Petitioners.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity whose

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[1] Their consents have been filed with the Clerk of the Court.

combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members or their constituents are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e *et seq.*). As such, EEAC's members have a direct interest in the issue presented for the Court's consideration; that is, whether the Court of Appeals for the Fifth Circuit has adopted incorrect legal criteria for determining a seniority system's "bona fides" within the meaning of Section 703(h) of Title VII.[2]

STATEMENT OF THE CASE

Plaintiffs in this class action employment discrimination suit claimed, *inter alia*, that the departmental seniority system contained in a collective bargaining agreement between Pullman-Standard and Local 1466 of the United Steelworkers of America was established and maintained with a racially discriminatory purpose, and that the system's perpetuation of the effects of the employer's prior discrimination is, therefore, not protected by § 703 (h) of Title VII.[3] After a trial, and pursuant to a four-factor analysis advanced by the Fifth Circuit in *James*

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[2] Because of its interest in issues involving interpretation of Section 703(h) of Title VII, EEAC has filed briefs as Amicus Curiae with this Court in *California Brewers Association v. Bryant*, 444 U.S. 598 (1980); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *United Air Lines v. Evans*, 431 U.S. 553 (1977); and *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977).

[3] § 703(h), provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race.

v. Stockham Valves & Fittings Co., 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978), the district court found that: (1) the seniority system is facially neutral and applies equally to all races and ethnic groups; (2) the seniority units are rational in accord with industry practice and N.L.R.B. precedent; (3) the seniority system had its genesis at a time when racial discrimination was widespread but not as a result of, or in furtherance of, such discrimination; and (4) the seniority system was negotiated and had been maintained free from any discriminatory purpose. *Swint v. Pullman-Standard*, —— F. Supp. ——, 17 FEP Cases 730,733-39 (N.D. Ala. 1978). Accordingly, the district court found that the seniority system is bona fide within the meaning of § 703(h).

On review, the Fifth Circuit rejected the district court's finding that the seniority system is bona fide. The circuit court inferred a discriminatory purpose in the negotiation and maintenance of the seniority system by construing the facts to show that the system, which reflects Pullman-Standard's departmental structure, was negotiated and instituted during a time when discrimination was prevalent in the area and the employer's discriminatory hiring and assignment policies resulted in segregated departments. In reaching this conclusion, the court also relied heavily upon the discriminatory policies and practices of another union (the International Association of Machinists) which was not and is not party to the collective bargaining agreement containing the seniority system at issue in this case. *Swint v. Pullman-Standard*, 624 F.2d 525, 530-34 (5th Cir. 1980).

SUMMARY OF ARGUMENT

The importance of collectively-bargained seniority systems, as well as the inevitable variety of such systems, has been recognized by Congress and this Court. In § 703 (h) of Title VII, Congress protected the rights vested under a bona fide seniority system, even if, as this Court made clear in *International Brotherhood of Teamsters v.*

United States, 431 U.S. 324 (1977), the neutral operation of the system perpetuates the effects of prior discrimination by the employer. In so holding, this Court rejected the contrary reasoning of *Local 189, United Papermakers & Paperworkers, AFL-CIO, CLC v. United States*, 416 F.2d 980 (5th Cir. 1969), and its progeny, and recognized that intent to discriminate must be shown if a seniority system is to be held unprotected by § 703 (h). Significantly, the Court also emphasized that Congress, in legislating to protect bona fide seniority systems, did not intend "to extend less protection to legitimate departmental seniority systems than to plantwide seniority systems." *Teamsters, supra*, 431 U.S. at 355, n.41.

In this case, as in most of its post-*Teamsters* Title VII seniority decisions, the Fifth Circuit has applied an erroneous "four-factor" test purportedly derived from language in the *Teamsters* decision.[4] Thus, in assessing the legality of a seniority system, the Fifth Circuit examines:

> 1) whether the seniority system operates to discourage all employees equally from transferring between seniority units;
>
> 2) whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice);
>
> 3) whether the seniority system had its genesis in racial discrimination; and
>
> 4) whether the system was negotiated and has been maintained free from any illegal purpose. *James, supra*, 559 F.2d, at 352.

As written, the Fifth Circuit's test variously misconstrues, misstates or shifts the emphasis of this Court's language. As applied by the court, the "four factor analysis" simply provides a new framework for justifying a finding, in this case and others, that if the effects of an employer's prior discrimination are per-

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[4] *See, Teamsters, supra*, 431 U.S. at 355, quoted *infra* at p. 15.

petuated by the neutral operation of a seniority system of less-than-plant-wide scope negotiated during a period of prevalent discrimination by the employer or in the community, discriminatory intent may also be inferred *ipso facto* with regard to the negotiation and maintenance of the seniority system. The court's analysis, therefore, returns the law of the Fifth Circuit to its discredited pre-*Teamsters* principles and, contrary to the will of Congress and the teachings of this Court, unnecessarily and improperly invalidates neutral seniority systems.

ARGUMENT

A. This Court Has Already Rejected Efforts by the Fifth Circuit to Establish a Rule That Title VII Is Violated by a Neutral Seniority System's Perpetuation of an Employer's Past Discrimination

The Fifth Circuit's current approach to the issue of the bona fides of seniority systems, as it appears in the decision below and other cases,[5] has been developed in response to this Court's decision in *Teamsters*. In order that the Fifth Circuit's reasoning may be seen in its context, discussion of the circuit court's analysis must be preceded by an examination of the *Teamsters* decision—what it held and what it rejected.

In *Teamsters*, this Court was called upon to decide whether § 703(h) validated an "otherwise bona fide seniority system" that perpetuated the effects of an employer's pre-Act discrimination and afforded "no constructive seniority" to the victims of such discrimination. *Teamsters*, *supra*, 431 U.S. at 348. The Court observed that:

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[5] *Terrell v. United States Pipe & Foundry Co.*, 644 F.2d 1112 (1981); *United States v. Georgia Power Co.*, 634 F.2d 929 (1981); *Swint v. Pullman-Standard*, 624 F.2d 525 (1980); *Harris v. Plastics Mfg. Co.*, 617 F.2d 438 (1980); *Fisher v. Procter & Gamble Mfg. Co.*, 613 F.2d 527 (1980); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (1978); and *James v. Stockham Valves and Fittings Co.*, 559 F.2d 310 (1977).

> [T]he unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII. As the legislative history shows, this was the intended result even where the employer's pre-Act discrimination resulted in whites having greater existing seniority rights than Negroes. Although a seniority system inevitably tends to perpetuate the effects of pre-Act discrimination in such cases, the congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act. *Id.* at 352-53.

Accordingly, as the Court held, "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." *Id.*, at 353-54.

In so holding, the Court squarely rejected "the Government's broad argument that no seniority system that tends to perpetuate pre-Act discrimination can be 'bona fide,'" (*id.*, at 353), as well as "the reasoning of the long line of cases which had held that a seniority and transfer system constituted present discrimination and violated Title VII if it perpetuated into the present the effects of pre-Act discrimination."[6] The "bedrock" of the rejected reasoning lies in *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968), and *Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC v. United States* (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

In *Local 189*, the Fifth Circuit set out a number of "principles" that cannot be said to have survived this Court's decision in *Teamsters*. The court of appeals had

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[6] Schlei and Grossman, Employment Discrimination Law, 1979 Supp. 6 (1979).

adopted the *Quarles* court's construction of § 703(h), *i.e.*, that "a racially discriminatory seniority system established before the act is [not] a *bona fide* seniority system under the act." *Local 189*, *supra*, 416 F.2d at 988, quoting *Quarles*, *supra*, 279 F. Supp. at 517. It is apparent that the Fifth Circuit viewed as racially discriminatory any seniority system that perpetuated the effects of past discrimination:

> It is not decisive therefore that a seniority system may appear to be neutral on its face if the inevitable effect of tying the system to the *past* is to cut into the employees *present* right not to be discriminated against on the ground of race. *Local 189*, *supra*, 416 F.2d at 988, emphasis in original.

The Fifth Circuit rejected the contention that such a seniority system which embodies no intent to discriminate is protected by § 703(h). The court held instead that the "requisite intent may be inferred from the fact that the defendants persisted in the conduct [*i.e.*, continued to maintain the seniority system] after its racial implications had become known to them." *Id.* at 995-97. Thus, in the court's view, mere perpetuation by a seniority system of the effects of prior discrimination supported an inference that the system was not bona fide and that the differences in wages or working conditions that derived from operation of the system were the result of an intent to discriminate.

Under the *Local 189* approach, if the employer and the union could not demonstrate that the seniority system was justified by "an overriding legitimate, nonracial business purpose," *i.e.*, that the particular seniority system was required by considerations of "safety and efficiency," then such a system "constitutes on-going discrimination." *Id.* at 989, 994. Significantly, the court was of the opinion that, in enacting § 703(h), Congress preferred some forms of seniority systems over others—specifically, that plant-wide or "mill seniority" was pre-

ferred over job or departmental seniority, which latter forms the court viewed as inherently discriminatory.[7]

In *Teamsters*, this Court rejected, implicitly or explicitly, all of the major elements of the Fifth Circuit's conceptual framework as it appeared in *Local 189*. Thus, this Court's core holding, that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination," 431 U.S. at 353-54, forthrightly rejected the *Quarles/Local 189* view "that § 703(h) does not immunize seniority systems that perpetuate the effects of prior discrimination." *See* 431 U.S. at 346, n.28.[8]

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[7] "Job seniority, embodying as it does, the racially determined effects of a biased past, constitutes a form of present racial discrimination." *Local 189, supra*, 416 F.2d at 990.

"As the court pointed out in *Quarles*, the treatment of 'job' or 'departmental' seniority raises problems different from those discussed in the Senate debates: 'a department seniority system that has its genesis in racial discrimination is not a bona fide seniority system.' 279 F. Supp. at 517." *Local 189*, 416 F.2d at 994-95.

The term "genesis in racial discrimination" was first applied to seniority systems in *Quarles*. As more fully discussed below (pp. 25-29), this term has been used in an undefined and highly suggestive manner by the Fifth Circuit in its post-*Teamsters* decisions. For this reason, it is important to observe that the facts of *Quarles*, as set forth by the district court (279 F. Supp. at 510-13), show that there was no suggestion that the seniority system was negotiated with an *intent* to discriminate. Accordingly, it is clear that the *Quarles* court viewed "genesis in discrimination" not as a "causative" concept but rather as something like "arising within a context of contemporaneous discrimination by the employer." *See id.* at 517. And *compare Swint v. Pullman-Standard*, 17 FEP Cases 730, 737 and n.20 (N.D. Ala. 1978), wherein the district court puzzled over the Fifth Circuit's ambiguous use of the term "genesis in discrimination." As discussed below, the "contemporaneous" interpretation of "genesis in discrimination," which was rejected by this Court in *Teamsters* (*see* 431 U.S. at 346, n.28, and discussion *infra* at n.8) is a crucial element in the Fifth Circuit's current approach to analyzing the bona fides of seniority systems.

[8] The *Teamsters* decision (at n.28) suggested a way in which *Quarles, et al.*, could be harmonized:

As in *Quarles* and *Local 189*, the facts of *Teamsters* showed a history of pre-Act discrimination by the employer in hiring and assignment, as well as a seniority system, negotiated and instituted well before the effective date of the Act, that "tracked" departmental assignments and tended to discourage transfers to more lucrative and desirable jobs. 431 U.S. at 349-50. The Court observed that "[t]his disproportionate distribution of advantages does in a very real sense 'operate to "freeze" the status quo of prior discriminatory employment practices.'" *Id.* at 350. It would be disingenuous to suggest that either the parties to the collective bargaining agreements in *Teamsters* or the employees in the bargaining units were unaware of this effect. Accordingly, as more fully discussed below, it is apparent that this Court did not follow the Fifth Circuit's suggestion that "intent to discriminate" vis-a-vis the neutral operation of a seniority system can be "inferred"

Insofar as the result in *Quarles* and in the cases that followed it depended upon findings that the seniority systems were themselves "racially discriminatory" or had their "genesis in racial discrimination," 279 F. Supp. at 517, the decisions can be viewed as resting upon the proposition that a seniority system that perpetuates the effects of pre-Act discrimination cannot be bona fide if an intent to discriminate entered into its very adoption.

In view of its holding that mere "perpetuation" will not support a finding that a seniority system is unlawfully discriminatory, the Court was thus making it clear that a showing of *intent* to discriminate would be necessary to sustain a finding that a seniority system was racially discriminatory or had its "genesis" in discrimination. As noted above, however (n.7), the facts of *Quarles* suggest no such intent, and there is nothing in the district court's opinion indicating that the lower court perceived an intent to discriminate in anything but the employer's pre-Act hiring policies. The court simply saw that "[t]he differences that originated before the Act are maintained now" by the seniority system, and held that "the present differences in departmental seniority of Negroes and white (sic) that result from the company's intentional, racially discriminatory hiring policy before January 1, 1966 are not validated by the *proviso* of § 703(h)" 279 F. Supp. at 517-18.

if the parties to the collective bargaining agreement are "aware" that the system perpetuates certain effects of prior discrimination by the employer.

The Court's holding in *Teamsters* that § 703(h) protects "the routine application of a bona fide seniority system" (431 U.S. at 352), coupled with its observation that Congress was extending equal protection to all bona fide seniority systems (and not just plant-wide systems) (*id.* at 355, n.41), make it clear that the Fifth Circuit's "business necessity doctrine" is irrelevant to the issue of the applicability of § 703(h). This Court emphasized that "[a]lthough a seniority system inevitably tends to perpetuate the effects of pre-Act discrimination in" cases where "the employer's pre-Act discrimination resulted in whites having greater existing seniority rights than Negroes" (*id.* at 352-53), Congress had "considered this very effect" (*id.* at 350), and had, nonetheless, immunized application of bona fide seniority systems (*id.* at 352).

That the system under consideration in a particular case might not be *necessitated* by considerations of safety and efficiency, or that the parties might have negotiated some other seniority scheme that would have had an equal "safety and efficiency quotient" but a lower "perpetuation quotient," are issues that have no bearing on the legality of the seniority system under Title VII. Congress did not want the courts to "second guess" the parties to a collective agreement, but insisted instead that seniority rights vested under *any* bona fide seniority system be respected, even if the system perpetuated the effects of prior discrimination. *See, California Brewers Ass'n v. Bryant*, 444 U.S. 598, 608 (1980); *Teamsters*, 431 U.S. at 350-51. And *see Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978) ("Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it."); *Steelworkers v. Weber*, 443 U.S. 193, 205-206 (1979); and *Texas Dept. of Community Affairs v. Burdine*, —— U.S. ——, 101 S.Ct. 1089,

1096 (1981) (Title VII "was not intended to 'diminish traditional management prerogatives.' ").

Against this background, it is evident that the Court saw § 703(h) as requiring that an analysis of the legal effect of a seniority system proceed differently than in other "disparate impact" cases.[9] Thus, while the *Griggs* (disparate impact) approach would require that an employment practice fair in form but discriminatory in operation must be justified by business necessity to avoid Title VII liability [*Griggs v. Duke Power Company*, 401 U.S 424, 429-32 (1971)], a neutral seniority system that perpetuates the effects of past discrimination need only be "bona fide" in order to be valid under Title VII.

B. A Neutral System Is Bona Fide Within the Meaning of Section 703(h) of Title VII Unless It Was Adopted or Has Been Applied With Discriminatory Purpose

The Court observed in *Teamsters* that § 703(h) protects only bona fide seniority systems, and that a proviso "requires that any differences in treatment not be the result of an intention to discriminate." 431 U.S. at 353. And the Court had earlier observed that certain lower court decisions, which arguably depended upon findings that the seniority systems at issue "were themselves 'racially discriminatory' or had their 'genesis in racial discrimination,' . . . can be viewed as resting upon the proposition that a seniority system that perpetuates the effects of pre-Act discrimination cannot be bona fide if an intent to discriminate entered into its very adoption." *Id.* at 346, n.28 (quoted at n.8, *supra*). In this light, the Court's rejection of the "Government's broad argument that no seniority system that tends to perpetuate pre-Act discrimination can be 'bona fide'," buttresses the Court's implicit holding that the *Griggs* approach to disparate impact cases is inapplicable to an analysis under § 703(h) and its rejection of the Fifth Circuit's sugges-

[9] *See, Teamsters*, 431 U.S. at 349 ("Were it not for § 703(h), the seniority system in this case would seem to fall under the *Griggs* rationale."); and *id.* at 335, n.15.

tion that discriminatory intent can be inferred from perpetuation.

The Government's argument apparently was based upon the assumption that intent to discriminate, or lack of bona fides, which would remove a facially neutral seniority system from § 703(h)'s protection, could be *inferred* from the seniority system's mere perpetuation of prior discrimination. As the Court observed, however, "reading the words 'bona fide' as the Government would have us do" would "disembowel § 703(h)" and "pervert the Congressional purpose" of protecting employees' vested seniority rights, "even where the employer has engaged in pre-Act discriminatory hiring or promotion practices." *Id.* at 353-355 and n.38.

Because perpetuation of past discrimination via the application of a bona fide seniority system does not violate the Act, and because intent to discriminate may not be inferred from the mere fact of such perpetuation, the statutory meaning of "bona fide" is crucial. Black's Law Dictionary defines "bona fide" as follows:

> BONA FIDE. In or with good faith; honestly, openly, and sincerely; without deceit or fraud. Truly; actually; without simulation or pretense. Innocently; in the attitude of trust and confidence; without notice of fraud, etc. Real, actual, genuine, and not feigned. Black's Law Dictionary 223, Rev'd Fourth Ed. (1968).

There are, thus, two distinct concepts at play in the accepted usage of the term "bona fide." The first concerns "honesty" or "lack of pretense or deception;" the second has to do with "genuineness." [10] Most cases assessing the bona fides of a seniority system under § 703(h) address the honesty/deception issue rather than the genuineness

[10] Concededly, the two concepts may be viewed as interrelated in that it is "dishonest" to claim "genuineness" for something that is not genuine. For the purposes of this discussion, however, the two senses of "bona fide" are treated as distinct, since, as discussed below, the distinction is implicit in the cases addressing the "bona fides" of particular seniority systems.

of the seniority system *qua* seniority system.[11] Specifically, with the exception of *Parson v. Kaiser Aluminum & Chemical Corp.*, 583 F.2d 132 (5th Cir. 1978), none of the Fifth Circuit's post-*Teamsters* decisions have suggested that the seniority rules at issue were not really seniority systems.[12] Rather, those decisions have given lip service to the proposition that a seniority system neutral on its face and in application is bona fide unless it is shown that the system was devised and has been maintained, at least in part, for the dishonest or hidden *purpose* of locking minority employees into jobs or departments where the employer had originally and discriminatorily assigned them.[13]

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[11] An exception, of course, is *California Brewers Association v. Bryant*, 444 U.S. 598 (1980). In that case, plaintiffs contended that a threshold requirement for entering a seniority track was not a genuine "seniority" rule, and, therefore, the seniority system in question was not a bona fide system entitled to the protection of § 703(h). The Court noted that "in order for any seniority system to operate at all, it has to contain ancillary rules that accomplish certain necessary functions. . . . Rules that serve these necessary purposes do not fall outside § 703(h) simply because they do not, in and of themselves, operate on the basis of some factor involving the passage of time." 444 U.S. at 607-608, footnotes omitted.

[12] *Parson*, decided prior to *California Brewers*, held that a "ten-day bottom entry requirement is not a seniority rule at all" and thus is not "immunized by § 703(h)." 583 F.2d at 133.

[13] *See, e.g., James v. Stockham Valves, supra*, 559 F.2d 310, 351 ("As we read the *Teamsters* opinion, the issue whether there has been purposeful discrimination in connection with the establishment or continuation of a seniority system is integral to a determination that the system is or is not bona fide."); *Swint v. Pullman-Standard, supra*, 624 F.2d 525, 530 (citing the above-quoted principle from *Stockham Valves*) and 533 ("there is no doubt, based upon the record in this case, about the existence of a discriminatory purpose."); *United States v. Georgia Power Co., supra*, 634 F.2d 929, 935 ("the issue under *James* and our subsequent decisions, however, is whether the *totality* of the circumstances demonstrates purposeful discrimination."); and *Terrell v. United States Pipe & Foundry Co., supra*, 644 F.2d 1112, 1116 ("The court correctly recognized that in order for a seniority system to be bona fide under § 703(h) of Title VII, it must not

If the "dishonesty" or discriminatory purpose theory is not to be self-contradictory, however, the lack of bona fides cannot be "accidental"—the apparent neutrality of the system must be, in fact, a deliberate sham to hide the discriminatory purpose. Conversely, a facially neutral seniority system which was negotiated and has been maintained and applied without any intent to discriminate cannot be other than bona fide. Accordingly, the clear implication of the Supreme Court's refusal in *Teamsters* to infer discriminatory intent from the mere perpetuation of the effects of prior discrimination is that specific intent to discriminate must be proved.[14] In other words, there must be evidence (beyond mere "perpetuation") showing or supporting an inference that an "intent to discriminate entered into [the] very adoption" of the seniority system (431 U.S. at 346, n.28), or that, in the words of the proviso to § 703(h), "differences [in "terms, conditions, or privileges of employment"] are the result of an intention to discriminate. . . ." As this Court observed in *Personnel Administrator of Massachusetts v.*

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have been created or maintained with the intention to discriminate.").

In one post-*Teamsters* case, however, a Fifth Circuit panel gave this proposition more than mere lip service. Thus, the court in *Southbridge Plastics Division v. Local 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America*, 565 F.2d 913 (1978), making no reference to the recently decided *James* decision, held, following *Teamsters*, that a "discriminatory purpose must be shown before a seniority system can be exempted from § 703(h)'s protection." *Id.* at 916. As there had been no such showing, the court refused to permit an EEOC conciliation agreement to override the parties' departmental seniority system, even though the system might perpetuate the effects of the employer's prior discrimination. *Id.*

[14] "[A]bsent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 82 (1977). In circumstances where "the operation of the seniority system itself is said to violate Title VII. . . ., § 703(h) unequivocally mandates that there is no statutory violation in the absence of a showing of discriminatory purpose." *Id.* at n.13.

Feeney, 442 U.S. 256 (1979), "'discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 279, footnotes and citations omitted.

C. The Fifth Circuit's "Four Factor" Test, Purportedly Based Upon Language From *Teamsters*, Undermines This Court's Holding in That Case, and Returns The Law of The Fifth Circuit To Its Discredited Pre-*Teamsters* Principles

In the penultimate paragraph of its analysis of the legality of the seniority system in *Teamsters*, this Court summarized a number of factors supporting its conclusion that "[t]he seniority system in this litigation is entirely bona fide." 431 U.S. at 355.

> It applies equally to all races and ethnic groups. To the extent that it "locks" employees into non-line-driver jobs, it does so for all. The city drivers and servicemen who are discouraged from transferring to line-driver jobs are not all Negroes or Spanish-surnamed Americans; to the contrary, the overwhelming majority are white. The placing of line drivers in a separate bargaining unit from other employees is rational in accord with the industry practice, and consistent with National Labor Relations Board precedents. It is conceded that the seniority system did not have its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose. *Id.* at 355-56, footnoes omitted.

As fully discussed above (pp. 11-15), it is apparent that this Court viewed proof of specific discriminatory intent as a prerequisite to holding a seniority system not bona fide. The above-quoted passage from *Teamsters* was not advanced as a necessary analytical framework but simply as the Court's summary of the circumstances of that case which confirmed the finding that the sen-

iority system at issue was bona fide within the meaning of the statute, that the system was not adopted or applied with discriminatory purpose. The Fifth Circuit, however, in *James v. Stockham Valves*, transmuted that summary of circumstances into what has become the court's test for deciding whether a seniority system is bona fide within the meaning of § 703(h).[15] The court's error in assuming that the paragraph from *Teamsters* was intended as a "test" is compounded by the fact that, in restating and applying the elements of that paragraph, the Fifth Circuit, as discussed below, has misunderstood or misrepresented this Court's points, and has, apparently, tended to recast or "improvise upon" the facts of a case in order to justify its results.[16] As now shown, the Fifth Circuit continues to decide Title VII seniority cases, albeit under what is advanced as a *Teamsters*-derived test, in much the same fashion as it did prior to the Supreme Court's decision.

In *James Stockham Valves*, the Fifth Circuit held that the Supreme Court's *Teamsters* decision had "focused on four factors" for analyzing "whether there has been purposeful discrimination in connection with the establishment or continuation of a seniority system," and thus whether the system is or is not bona fide. 559 F.2d at 351-52. Those "factors" are:

> 1) whether the seniority system operates to discourage all employees equally from transferring between seniority units;
>
> 2) whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice);

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[15] *See, e.g., James v. Stockham Valves, supra*, 559 F.2d at 352; *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d at 1192; *Fisher v. Procter & Gamble*, 613 F.2d at 542; *Swint v. Pullman-Standard*, 624 F.2d at 530; *United States v. Georgia Power Co.*, 634 F.2d at 934; and *Terrell v. United States Pipe & Foundry Co.*, 644 F.2d at 1116-17.

[16] *See* discussion below, pp. 23-24, n.6.

3) whether the seniority system had its genesis in racial discrimination; and

4) whether the system was negotiated and has been maintained free from any illegal purpose. *Id.* at 352, quoted above, p. 4.

a. ***Factor (1)—"Whether the Seniority System Operates to Discourage All Employees Equally From Transferring Between Seniority Units"***

The superficial similarity of the Fifth Circuit's "factor (1)" to the Supreme Court's observation that the seniority system in *Teamsters* "applies equally to all races and ethnic groups," hides an important shift in emphasis. Thus, the circuit court decides "whether the seniority system operates to discourage all employees equally" by computing whether *numerically more* minority employees than non-minority employees are "discouraged" from transferring. The Fifth Circuit apparently misconstrued this Court's observation, at 431 U.S., 357, that "the overwhelming majority [of "city drivers and servicemen who are discouraged from transferring to line-driver jobs"] are white." Thus, as the Fifth Circuit pointed out in *Georgia Power*:

> [U]nlike in *Teamsters* where those discouraged from transferring to line-driver jobs were not predominantly members of minority groups, 431 U.S. at 355-56, 97 S.Ct. at 1864-65, here, the overwhelming majority of employees discouraged by a total loss of seniority from transferring to the better-paying, more desirable jobs were black. In this way, the seniority system operated to "lock" black workers into inferior jobs. 634 F.2d at 935.

Therefore, the circuit court's analysis focuses upon numerical or proportional impact of the seniority system [17]

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[17] *See, e.g., Swint v. Pullman-Standard*, 624 F.2d at 531 (court should consider "the fact that by locking blacks into the least remunerative departments the greater impact was felt by blacks than by whites."); *United States v. Georgia Power Co.*, 634 F.2d at 935 (in spite of a finding that "[a]ny employee transferring between seniority units . . . lost all seniority rights, regardless

(which is another way of measuring the system's "perpetuation quotient") and, as a result, renders irrelevant the Supreme Court's emphasis on *equality of application*.[18] This approach makes it virtually impossible for any neutral seniority system, which, in its routine application pereptuates the effects of an employer's pre-Act discrimination, to pass muster under "factor (1)."

The Fifth Circuit's application of "factor (1)" in the instant case (624 F.2d at 530-31) is relatively noncommittal. The court did not dispute the district court's findings that the seniority system is fair and neutral in its operation. The court did, however, take issue with the lower court's refusal, based on language in an earlier circuit court decision in this case, to "measure neutrality" without reference to the relative desirability of jobs.[19] In response, the circuit court stated that its ear-

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of his race," the court found that this "facial (sic) equality . . . was but a mask for the gross inequality beneath." Since the numerical majority of those discouraged from transferring was black, "[i]t is . . . apparent that in discouraging transfers between seniority units, the seniority system did not operate equally on the races but had a disproportionately heavy negative impact on blacks."); *Terrell v. United States Pipe & Foundry Co.*, 644 F.2d at 1119 ("The *disparate impact* of the . . . seniority system on black employees is obvious and well documented. . . . We have held that *disparate impact* constitutes not only relevant evidence of discriminatory purpose, *Swint*, but can conclusively resolve the 'equality' factor in favor of those who have suffered such discrimination. *See Georgia Power.*") (Emphasis added.) And *compare* the analysis of this issue by the district court in *Swint*, 17 FEP Cases 730, 733-34.

[18] *See Carroll v. United Steelworkers of America*, 498 F. Supp. 976, 986 (D. Md. 1980), wherein the court observed that conditioning a finding that a seniority system is equal in its application upon a preliminary showing that "most of the persons discouraged from transferring to other jobs were white . . . would distort the facts and analysis in *Teamsters*."

[19] The district court's discussion of this issue is as follows:

> By ranking the twenty-eight USW and IAM departments according to some perceived order of desirability, one could however attempt to measure the relative effect of the no-

lier holding "cannot reasonably be construed to preclude consideration of the *fact* that by locking blacks into the least remunerative departments a greater impact was felt by blacks than by whites." 624 F.2d at 531. emphasis added. Apparently, the court here implicitly assumed that there is a disparate impact on blacks with regard to the "lock-in" effect of the seniority system.

It must be observed, however, that the lock-in effect in this case (*i.e.*, seniority forfeiture on transfer and consequent inability to "catch-up" in new units) is the same as that described in *Teamsters* (*see* 431 U.S. at 344-345), and it was precisely this effect—"this continued, built-in disadvantage" (*id.* at 345)—which was attacked as a continuing violation of Title VII because it perpetuated the effects of past discrimination. As this Court made clear, however, such perpetuation does not invalidate an otherwise neutral bona fide seniority system nor does it support an inference that the system is discriminatorily motivated. Accordingly, to the degree that the Fifth Circuit in *Swint* relied upon a "disparate impact/perpetuation" theory in finding that the seniority system was unlawful, the court's application of a discredited legal standard constituted reversible error.

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transfer rule on white and black employees, *i.e.*, to determine which group was the more discouraged from transferring. It may well be that a somewhat greater impact was felt by blacks than by whites, although . . . this conclusion is by no means certain. In any event, the rationale of the Fifth Circuit in Pullman-Standard II indicates that such a study of relative economic desirability would be inappropriate. If one is to measure inequality without reference to economic desirability, it would seem logical to likewise measure its opposite—equality or neutrality—without reference to such desirability. Under this approach, it is clear that the pre-1972 no-transfer rule applied equally and uniformly to all employees, black and white, and that given the approximately equal number of employees of the two groups, it was quantitatively neutral as well. 17 FEP Cases at 734.

b. ***Factor (2)—"Whether the Seniority Units Are In the Same or Separate Bargaining Units (If the Latter, Whether That Structure Is Rational and In Conformance With Industry Practice)"***

The Fifth Circuit's wording and discussion of "factor (2)" in *James*, and the court's application of this factor in subsequent cases, show that the circuit court has misapprehended the point of this Court's observation that "[t]he placing the line drivers in a separate bargaining unit from other employees is rational in accord with industry practice, and consistent with National Labor Relations Board precedents." *Teamsters*, 431 U.S. at 356, footnote omitted. The Supreme Court was *not*, as the court of appeals contends in *James*, "discussing the relationship of seniority units to bargaining units" or suggesting that a different analysis should be applied depending upon "whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice)." *James*, 559 F. 2d at 352. Rather, the Court was observing that consistency with industry practice and Board precedent [20] added further support to its finding that the seniority system, wherein separate seniority units tracked separate bargaining units, was bona fide. But it should be clear that the Court does not view consistency with practice or precedent as a *prerequisite* to such a finding. In *California Brewers*, this Court emphasized that parties to collective bargaining in diverse circumstances will inevitably fashion a wide variety of seniority systems:

> Congress passed the Civil Rights Act of 1964 against the backdrop of this Nation's long-standing labor policy of leaving to the chosen representatives of employers and employees the freedom through col-

[20] Pursuant to authority granted in Section 9(b) of the National Labor Relations Act [29 U.S.C. § 159(b)], the NLRB determines units appropriate for collective bargaining. For a discussion of the factors considered by the Board in determining an appropriate unit, *see* Morris, Developing Labor Law 201, 217-22 (1971).

> lective bargaining to establish conditions of employment applicable to a particular business or industrial environment. See generally *United Steelworkers v. Weber*, 433 U.S. ——, 99 S.Ct. 2721, 61 L.Ed.2d 480. It does not behoove a court to second-guess either that process or its products. *Porter Co. v. NLRB*, 397 U.S. 99, 90 S.Ct. 821, 25 L.Ed.2d 146. Seniority systems, reflecting as they do, not only the give and take of free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all sizes and shapes. See *Ford Motor Co. v. Huffman*, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048; *Aeronautical Lodge v. Campbell*, 337 U.S. 521, 69 S.Ct. 1287, 93 L.Ed. 1513. As we made clear in the *Teamsters* case, seniority may be "measured in a number of ways" and the legislative history of § 703(h) does not suggest that it was enacted to prefer any particular variety of seniority system over any other. 431 U.S. at 355, n.41, 97 S.Ct. at 1865.[21]

If an employer and a union, attempting to address their special concerns, developed a unique but nondiscriminatory seniority system (*see, e.g., California Brewers*, 444

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[21] *California Brewers, supra*, 444 U.S. at 608. The Court has long recognized that differing industrial circumstances and bargaining goals have given rise to a wide variety of seniority systems, including varying definitions of seniority units. *See Aeronautical Lodge v. Campbell*, 337 U.S. 521, 526-27 (1949). Congressional deference to the rights secured by seniority systems has been recognized by the Court in a variety of contexts. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) (requirement of § 701(j) of Title VII that employers and unions reasonably accommodate employee's religious practices, absent undue hardship, does not require abrogation of other employees' collectively-bargained seniority rights); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) (a bona fide seniority system that perpetuates the effects the employer's past discrimination is nonetheless protected by § 703(h) of Title VII); *California Brewers Association v. Bryant*, —— U.S. ——, 100 S. Ct. 814 (1980) (a seniority system's "ancillary rules" do not fall outside the protections of § 703(h) simply because they do not "operate on the basis of some factor involving the passage of time.")

U.S. at 602-604), there would be no basis for holding that system non-bona fide simply because it might differ from industry practice or be based upon "unprecedented" bargaining units.

The point must be stressed that a bargaining agreement's definition of seniority units is purposive and functional, generally reflecting a compromise between the union's goal of protecting and/or enhancing employees' status in proportion to length of service and the employer's goal of ensuring a stable, productive, safe and efficient workforce.[22] To the degree that the latter goal is sacrificed to the former, the interests of both employers and employees may suffer.[23] In this regard, it is significant that even collective bargaining agreements providing for *plant-wide* seniority (as opposed to departmental or occupational seniority) often provide that such seniority will be determinative only where other factors (*e.g.*, ability to perform the work and physical fitness) are relatively equal.[24] In an industrial setting, where special skills are most often acquired in specific departments or lines of progression, the practical effect of such ability/fitness requirements is that management is assured that an individual with relatively high plant seniority but lacking the requisite skills cannot "bump" or

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[22] *See, e.g.*, the court's discussion of "Rationality of the Seniority Units" in *Carroll v. United Steelworkers of America, AFL-CIO-CLC*, 498 F. Supp. 976, 987-89 (D. Md. 1980).

[23] *See, e.g., Swint v. Pullman-Standard*, —— F. Supp. ——, 17 FEP Cases 730, 734, n.7 (N.D. Ala. 1978), wherein the court noted that the adoption of plant-wide seniority at one of Pullman's plants gave rise to problems which "contributed substantially to the ultimate closing of the plant for economic reasons."

[24] *See, e.g.*, the collective bargaining agreement of the United States Steel Corporation and the United Steelworkers of America, set forth in Collective Bargaining, Negotiations and Contracts, Vol. 1, Techniques and Trends; Current Settlements 29:34 (1980). While seniority is measured under this agreement on a plant-wide basis, "seniority shall be applied *in the seniority units* which may be an entire plant or any subdivision thereof, as established or agreed upon." *Id.*, emphasis supplied.

be promoted or transferred into a job where that person's inability to perform would jeopardize safety, efficiency or productivity. An incidental effect of this form of plant-wide seniority *may be* to perpetuate prior discriminatory job assignments to departments or lines of progression which do not provide the skills necessary to move into the "more desirable" jobs or departments. But as *Teamsters* made clear, such an incidental effect would in no way undermine the legality, rationality or the practical necessity of such requirements.

As is apparent in *James*, and subsequent Fifth Circuit seniority decisions, however, the court's "factor (2)" erroneously assumes that the Supreme Court viewed seniority systems which were not congruent with bargaining units as somehow suspect, requiring a more stringent analysis (*i.e.*, "whether that structure is rational and in conformance with industry practice.").[25]

Moreover, the court's application of its "factor (2)" in *Swint* (624 F. 2d at 531-32) suggests that the court gives little weight to facts demonstrating the rationality of bargaining units and/or seniority units.[26] Thus, rather

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[25] *See, e.g., James*, 559 F.2d at 353 ("unlike the facts of *Teamsters*, here the seniority units do not reflect existing separate and distinct bargaining units that conform to industry practice."); *Swint*, 624 F.2d at 531-532 (the court found "arbitrary creation of departments by the company since unionization" and "individual differences between the departmental structure at Pullman-Standard and that of other plants, and as compared with industry practice . . . indicative of attempts to maintain one-race departments," rejecting the district court's findings that "separation within the various units . . . was required by a specific decision of the N.L.R.B." and that the "departmentalization at Pullman-Standard [was] rational, in accordance with industry practice, and consistent with N.L.R.B. policies."); and *Georgia Power*, 634 F.2d at 936 ("there were no separate bargaining units and the 'black' seniority units were therefore part of the same bargaining unit as the 'white' seniority units. Any unequal treatment caused by the seniority system cannot be explained by or attributed to the division of bargaining units.").

[26] *Compare* the court's discussion of the "facts" (624 F.2d at 531-32) *with* the district court's findings (17 FEP Cases at 734-

than examining the rationality of seniority units, the Fifth Circuit has established what amounts to a *per se* rule, whereby seniority systems of less than plant-wide scope will almost inevitably fail to pass muster.[27]

In sum, the Fifth Circuit's "factor (2)" mistates the Supreme Court's point regarding the rationality of separate bargaining units, and, as applied by the court, is simply another way of finding that intent to discriminate may be inferred from the perpetuation, by a neutral seniority system, of the effects of past discrimination by the employer. It must, therefore, be repudiated as an attempt to revive a principle which was rejected by the Supreme Court in *Teamsters*.

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37). The USW petition for certiorari discusses in detail the Union's view of the Fifth Circuit's "liberties" with the facts. *See* USW *cert. pet.* at 16-19.

Similarly, *compare* the court's discussion of "factor (2)" in *Georgia Power*, 634 F.2d at 935-36, *with* the district court's findings of fact regarding the operation of the seniority system, *U.S. v. Georgia Power Co.*, 3 EPD ¶ 8318, pp. 7077-78 (N.D. Ga. 1971).

[27] The court has made its bias in favor of plant-wide seniority most clear in *Terrell*, where the court held that a union could escape liability with regard to a unit seniority system held unlawful under a *James/Swint/Georgia Power* rationale only if the union actively had sought, albeit unsuccessfully, to negotiate a *plant-wide* seniority system. *See*, 644 F.2d at 1120-1121. The court in *Terrell* also referred to the *Georgia Power* and *Swint* decisions as containing "descriptions of the discriminatory operation of seniority systems with 'lock-in' provisions." *Id.* at 1115.

Of the three post-*Teamsters* decisions in which the Fifth Circuit has held seniority systems *protected* by § 703(h), one involved a *plant-wide* (as opposed to a departmental) system [*Fisher v. Procter & Gamble Mfg. Co.*, 613 F.2d 527, 542 (1980)]; one affirmed a district court's dismissal of plaintiffs' case as "frivolous" and "without merit" where plaintiffs adduced no evidence to support their claims of discrimination vis-a-vis the seniority system [*Harris v. Plastics Mfg. Co.*, 617 F.2d 438, 440 (1980)]; and one, without mentioning the *James* decision, held that a seniority system is protected by § 703(h) unless discriminatory purpose is *shown* [*Southbridge Plastics, supra*, n.13].

c. *Factors (3) and (4)—"Whether the Seniority System Had Its Genesis In Racial Discrimination" and "Whether the System Was Negotiated and Has Been Maintained Free From Any Illegal Purpose"*

"Factors (3) and (4)" in the Fifth Circuit's analysis derive from the court's separation of two clauses[28] in the Supreme Court's observation in *Teamsters*, "[i]t is conceded that the seniority system did not have its genesis in racial discrimination and that it was negotiated and has been maintained free from any illegal purpose."[29] *Teamsters*, 431 U.S., at 356. In evaluating the

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[28] The confusion generated by this arbitrary separation and apotheosis is reflected in the district court's attempts in *Swint* to apply these "factors" in a logically consistent manner. *See* 17 FEP Cases, 737-39. The cited pages also demonstrate the interrelation of this Court's observations, and buttress our contention that the Court did not intend that its words be viewed as a test. Thus, as the district court observed, "facts already discussed" (*i.e.*, with regard to the first three factors) make it clear that the "seniority system was negotiated and maintained free from any discriminatory purpose." *Id.* at 739. More specifically, a system which did not have its genesis in racial discrimination is one which was negotiated free from illegal purpose, and one that "applies equally to all races and ethnic groups" has been "maintained" on a nondiscriminatory basis.

[29] In view of this Court's reversal, in *Teamsters*, of the line of cases holding that a violation of Title VII may be found, and discriminatory intent inferred, from the mere perpetuation of the effects of an employer's past discrimination, no plaintiff will ever again "concede" that a "seniority system did not have its genesis in racial discrimination," or that the system was negotiated and maintained "free from any illegal purpose." *See, e.g., James*, 559 F.2d at 352 ("There is no such concession here. The seniority system at Stockham was adopted in a collective bargaining agreement in 1949, when segregation in the South was standing operating procedure.")

It is reasonable to assume that the "concession" in *Teamsters* was made on the bases of the neutral operation of the system, and of evidence, submitted by the parties to the collective bargaining agreement, that discriminatory intent did not enter into the adoption of the seniority system there. In *Swint*, and in most of the other post-*Teamsters* Fifth Circuit seniority cases, the same situation obtains. Evidence produced by the parties to the collective

bona fides of the seniority system, there can be no doubt that these "factors," *if* applied in a manner that is consistent with the Court's decision in *Teamsters*, would be determinative. Thus, if the seniority system had its "genesis in discrimination" in the sense that "an intent to discriminate entered into its very adoption" (*Teamsters*, 431 U.S. at 346, n.28), the system may not be bona fide.[30] Similarly, if discriminatory *purpose* were shown to have entered into the negotiation (*i.e.*, "genesis") or maintenance (*i.e.*, administration and/or renegotiation) of the seniority system, the seniority system might not be protected by § 703(h).

In its application of "factors (3) and (4)," however, the Fifth Circuit has not focused on evidence of discriminatory intent in the negotiation or maintenance of the seniority systems.[31] Rather, the court has viewed "genesis" not as a "causative" concept, but as pertaining to the *time* of negotiation, and has inferred the existence of discriminatory purpose if a departmental or occupational seniority system was negotiated at a time when discrimination was practiced by the employer and in the surrounding community, and if the seniority system perpetuates the effects of the employer's discriminatory

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bargaining agreement reveals no *intent* to discriminate entering into the adoption of the seniority system, which is applied equally to all employees. (*See* n.31 below.) The plaintiffs were not, apparently, present at the negotiations, and they advance no evidence to suggest that discriminatory intent was involved. Plaintiffs do not, however, *concede* the absence of discriminatory intent (since such a concession would result in dismissal of their case).

[30] *See* discussion, *supra*, at n.8.

[31] In fact, in this case and others, the court has failed to reconcile its holdings with evidence or lower court findings that there was *no* such intent. *Compare, e.g., Swint*, 17 FEP Cases, 737-39, *with* 624 F.2d 532-33; and *compare Georgia Power*, 634 F.2d at 936-37 *with U.S. v. Georgia Power Co.*, 470 F. Supp. 649, 652 (N.D. Ga. 1979) and 3 EPD ¶ 8318 at 7093 (N.D. Ga. 1971).

hiring or assignment policies.[32] In the instant case, the circuit court cited no evidence of discriminatory intent on the part of the USW, but found that the seniority system failed to pass muster under "factors (3) and (4)" based primarily upon contemporaneous discrimination by the employer and by another union *not* a party to the collective bargaining agreement between the USW and the employer. 624 F.2d at 533.

As discussed above, the circuit court in *Swint* left undisturbed the district court's "factor (1)" findings that the seniority system is neutral on its face and as applied. Thus, other than perpetuating the effects of the employer's past discrimination, the *maintenance* of the seniority system had no adverse impact on black employees. Contrary to logic and common sense, the court appears to be holding that, aside from an effect which this Court has held to be protected by § 703(h), the administration of a neutral seniority system in a neutral fashion suggests discriminatory motivation. Moreover, beyond the court's inference drawn from "contemporaneous events" (and in spite of district court findings and substantial evidence to the effect that the USW, even in Alabama in 1941, was a *non*-discriminatory institution),[33] the cir-

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[32] *See, e.g., James*, 559 F.2d at 352 ("The seniority system . . . was adopted in a collective bargaining agreement in 1949 when segregation in the South was standing (sic) operating procedure."); *Swint*, 624 F.2d at 532-33 (court relies upon discrimination in the community, by the employer and by the I.A.M.); *Georgia Power*, 634 F.2d at 936 ("the seniority system had its genesis in an era of overt racial discrimination."); *Terrell*, 644 F.2d at 1118 ("the system arose in an era of overt racial discrimination.").

[33] *See* 17 FEP Cases at 738; and *compare Terrell*, 644 F.2d 1112. The facts of *Terrell* show that the USW began its organizational efforts at the United States Pipe facility in Bessemer, Alabama (the location of the Pullman-Standard facility in *Swint*) in 1939. *Id.* at 1115. As in *Swint*, NLRB elections resulted in representation of employees in various crafts by various unions, with the USW representing the remaining employees, in *Terrell* a "predominately-black group." *Id.* at 1116. As in *Teamsters*, the seniority system in *Terrell* was generally based upon seniority within the bargaining units. *Id.* at 1115. After 1968, the USW consistently

cuit court cited no *evidence* contradicting the district court's extensive factual findings, under "factors (3) and (4)," exonerating the USW.[34]

As is apparent, the circuit court's application of its "factors (3) and (4)" bears no relation to the passage from *Teamsters* which is the purported source of those factors. Thus, in the absence of evidence of discriminatory intent (or in the face of evidence to the contrary), the Fifth Circuit will infer such intent from the negotiation and administration of a neutral seniority system that perpetuates an employer's past discrimination if, at the time of negotiation, there was prevalent racial discrimination by the employer and in the surrounding community.[35] Like the other "factors," "(3) and (4)" repre-

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proposed plant-wide seniority, but this was resisted by the other unions. Primarily on the basis of the USW's pursuit of plant-wide seniority, the Fifth Circuit in *Terrell* excused the union from liability under Title VII. Of particular interest is the following passage:

> The district court found that the evidence in this case supported the general observation that the Steelworkers constituted "one of the few institutions in the area which did not function in fact to foster and maintain segregation." The United Steelworkers of America has a well-known history of striving to achieve racial equality and integration in the labor movement. *Id.* at 1121.

Inasmuch as the district court in *Swint* made an identical finding, that the "USW local was one of the few institutions in the area which did not function in fact to foster and maintain segregation" (17 FEP Cases at 738), the failure of Judge Hatchett, who wrote the Fifth Circuit's opinions in both *Swint* and *Terrell*, to give equal weight to *these* "contemporaneous events" is somewhat puzzling. The only explanation seems to be that in *Swint*, the USW negotiators bargained for and obtained a departmental seniority system. But also ignored by the Fifth Circuit was the district court's findings here that the departmental system administered by the USW was a major cause of the elimination of segregation at Pullman-Standard even *before* the enactment of Title VII. 17 FEP Cases at 738.

[34] *See* 17 FEP Cases at 737-39.

[35] Not only is the Fifth Circuit's standard legally impermissible, it is logically circular. A neutral seniority system would have no

sent a veiled return to the mode of analysis used by the Fifth Circuit prior to *Teamsters* but rejected by the Supreme Court in that case.

The Fifth Circuit's attitude in this regard is at odds with the Supreme Court's oft-expressed reluctance to modify a collectively-bargained seniority system, or even to find such a system unlawful. As the Court emphasized in *Teamsters*, "Post-Act discriminatees . . . may obtain full 'make whole' relief, including retroactive seniority under *Franks v. Bowman* . . . without attacking the legality of the seniority system as applied to them." 431 U.S. at 347. This is because, in a "perpetuation" case, the "underlying legal wrong . . . is not the alleged operation of a racially discriminatory seniority system but of a racially discriminatory hiring system." *Franks v. Bowman Transp. Co., supra*, 424 U.S. 747, 758 (1976). The fact that the relief available to discriminatees would not be enlarged by holding unlawful a seniority system that perpetuated the effects of the employer's post-Act discrimination is, as the Court has stated, "simply an additional reason not to hold the seniority system unlawful." *Teamsters*, 431 U.S. at 348, n.30.

It was obviously for this reason that the Court in *Teamsters* cast the issue of the system's legality in terms of the relief available: "We must decide, in short, whether § 703(h) validates otherwise bona fide seniority systems that afford no constructive seniority to victims discriminated against prior to the effective date of Title VII. . . ." *Id.*, 431 U.S., at 348. The Court's reluctance to invalidate seniority systems simply reflects the Con-

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discrimination to perpetuate unless the employer had discriminated in the past. Such employer discrimination, especially in the South before the passage of the Act, could be assumed to reflect community attitudes and practices. It is thus difficult to imagine a situation in which the discrimination perpetuated by the routine application of a neutral seniority system did *not* arise at a time when such discrimination was prevalent in the community or by the employers in the community.

gressional policy, expressed in § 703(h), that seniority rights vested under a bona fide seniority system were not to be disturbed.

CONCLUSION

Contrary to the Congressional goal of protecting employee rights vested under bona fide seniority systems, the Fifth Circuit's test, as applied by the court below in this case and in other cases, invalidates such systems based upon an impermissible inference that discriminatory intent is inherent in any neutral seniority system that perpetuates the effects of an employer's past discrimination. This Court has already held that such perpetuation will not sustain a finding that an otherwise neutral system is unlawful and has emphasized the impropriety of invalidating or modifying seniority systems that do not embody purposeful discrimination. The Fifth Circuit's application of its "four factor" analysis returns the law of that circuit to its pre-*Teamsters* principles and renders vulnerable any less-than-plant-wide seniority system negotiated within the circuit's boundaries prior to the effective date of the Act. This Court should, therefore, reject the Fifth Circuit's approach and make it clear that a neutral seniority system is bona fide within the meaning of § 703(h) unless it is demonstrated that intent to discriminate entered into the system's negotiation and maintenance.

Respectfully submitted,

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